Filed 8/19/14 P. v. Eshaya CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ESHAYA GILBERT ESHAYA, Defendant and Appellant.	F066694 (Super. Ct. No. CRF39581) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Following his convictions for second degree burglary (Pen. Code,[1] § 459), petty theft with a prior theft conviction (§ 666), and false representation to a peace officer (§ 148.9, subd. (a)), defendant appeals, contending the trial court violated his due process rights when it failed to instruct the jury that there must be a union of act and intent for purposes of aiding and abetting. He further asserts the trial court erred by permitting testimony by law enforcement concerning theft employed by the "push-out" method because the testimony was inappropriate profile evidence offered by an expert. Next, defendant maintains he was denied the effective assistance of counsel when a question posed by his attorney elicited a hearsay statement made by defendant to his girlfriend, providing the People with an opportunity to successfully move to introduce evidence of defendant's prior theft convictions. Lastly, defendant asserts the trial court erred when it imposed a concurrent sentence on count II because that sentence should have been stayed pursuant to section 654.

We find any error by the trial court in instructing the jury regarding aiding and abetting a crime was harmless, that the testimony concerning the push-out method of theft was not inappropriately admitted, and that defense counsel's presumed error in eliciting hearsay does not require reversal. We accept respondent's concession regarding the trial court's unauthorized imposition of a concurrent sentence on count II and will direct the trial court to amend the abstract of judgment.

FACTUAL BACKGROUND

The People's Case

On October 2, 2012, while on routine patrol, Sonora police officer Andrew Theodore contacted Trina Jones and defendant, driver and passenger, respectively. During that contact, defendant was asked for identification. He stated he did not have identification with him, but provided the name "Ray Eshaya" with a date of birth.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant appeared more nervous after providing his name. Theodore suspected defendant had provided a false name because "no information came back" from a records check with the name provided by defendant. The dispatcher advised the officer of a near match with another first name: Gilbert Eshaya. A felony warrant was pending in Stanislaus County under that name.

Defendant was asked to exit the vehicle; he did so and was handcuffed. Defendant again provided the first name "Ray" and denied his name was Gilbert. A subsequent search of the vehicle revealed a pair of pants in the back seat; the pants were close to defendant's size. A wallet was found inside the pants with identification belonging to "Eshaya Gilbert Eshaya" and bearing a photograph of defendant. He was arrested on the outstanding felony warrant.

The search of Jones's vehicle continued. In the trunk, Theodore observed a generator in its original packaging. Having almost purchased the same generator previously, the officer estimated its value at approximately $500.[2] The officer asked Jones who the generator belonged to. Jones initially denied any knowledge of the generator. Thereafter, she identified a number of other individuals as having possibly placed the generator in the trunk of her car, including her sister and defendant. Theodore became concerned the generator had been stolen. Eventually, Jones indicated defendant purchased the generator from OSH for Jones's brother-in-law in Marysville.

When defendant was separately asked about the generator, he stated that whatever Jones had said happened was indeed what had happened. However, defendant denied purchasing the generator, instead indicating Jones had done so.

Theodore eventually made contact with a manager on duty at the OSH store in Sonora. Jacob Foiada confirmed the generator found in Jones's vehicle had been taken from the OSH store's inventory. Videotape footage was obtained from OSH; those

[2]An Orchard Supply Hardware (OSH) employee testified that generator was priced new at $579, and was also sold refurbished at a discount of 10 percent.

videos were played for the jury. The footage showed defendant approach a cashier with the generator in a cart. Apparently unable to provide payment, he pushed the cart away toward some barbeque grills located near the exit area. Defendant left the store. Jones then entered the store a short time later and subsequently approached the check stand with a bag of potting soil. She purchased the potting soil, moved her cart toward the barbeques, and after looking around for a moment or two, removed the bag of potting soil from her cart and placed it on top of the generator still sitting in the cart where defendant had left it. Jones then exited the store with the potting soil and the generator.

OSH cashier Rose Johnson recalled working on September 25, 2012, when a man came through her line attempting to purchase a generator. The customer, however, was unable to complete the transaction. Johnson recalled the customer putting the cart containing the generator near the barbeque grills. She did not recall telling the customer to do so.

When confronted with the videotape evidence by Officer Theodore, Jones denied going to OSH with defendant, indicating instead it was a coincidence defendant had placed the generator near the exit door. Jones stated she saw the generator sitting in the cart and stole it for her brother. When confronted with the same videotape evidence, defendant acknowledged approaching the cash register, then pushing the cart to the area near the barbeques. He did not indicate he purchased the generator, nor did he give any statement in support of Jones's various explanations.

The Defense Case

Jones testified defendant was her boyfriend and they lived together in Modesto with other members of her family. Defendant has always used the name "Ray Eshaya."

Prior to living in Modesto, Jones lived in Tuolumne County for five or six years. She and defendant were in Sonora on September 25, 2012, to "take care of other business," and in the course of doing so, stopped at OSH. Specifically, Jones asked defendant to "go into OSH and see about a generator" while she went to a nearby bank. When Jones returned from her banking errand, she parked at OSH and waited for

defendant to exit the store. Five to ten minutes later, defendant exited the store without a generator. He handed Jones her bank card and told her it did not work. Jones took the bank card from defendant and told him she would go into the store and get the generator.

Inside, Jones purchased a bag of potting soil for her yard. Near the exit, Jones saw the generator and assumed it was the one defendant had selected. She reviewed her receipt, looked around the store, and decided to take the generator without paying for it. She denied planning with defendant to steal the generator; rather, she indicated she was low on funds and the generator was easily accessible. Once Jones reached her car in the parking lot, she had difficulty getting the generator into the trunk and needed defendant's assistance to do so.

On October 2, 2012, Jones was in Sonora to attend a court hearing scheduled for 8:30 a.m. However, before she could attend the hearing, she was pulled over by law enforcement. Jones admitted giving a number of different explanations for the generator in her trunk, but eventually she told the truth and was arrested. Jones subsequently pled guilty to felony second degree burglary.

DISCUSSION

I. The Jury Instructions

"The law imposes on a trial court the sua sponte duty to properly instruct the jury on the relevant law and, as such, requires the giving of a correct instruction regarding the intent necessary to commit the offense and the union between that intent and the defendant's act or conduct. [Citations.]" (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1185.) We independently assess whether instructions correctly state the law (*People v. Posey* (2004) 32 Cal.4th 193, 218), keeping in mind "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] '[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.' [Citation.] 'The absence of an essential element in one instruction may be supplied by another or

cured in light of the instructions as a whole.' [Citation.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538–539, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

Here, the trial court instructed the jury with CALCRIM No. 400[3] (a person who aids and abets the actual perpetrator of a crime is guilty of the offense) and CALCRIM No. 1702, which provides:

> "To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary before the perpetrator finally left the structure."

The jury was also instructed, following a request for the definition of accomplice, with section 31:

> "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed."

The court did not give CALCRIM No. 401, which provides in pertinent part:

> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:
>
> "1. The perpetrator committed the crime;
>
> "2. The defendant knew that the perpetrator intended to commit the crime;

---

[3]CALCRIM No. 400 provides that:

"A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.

"A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

"Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

The instruction also provides that mere presence at the scene of a crime or failing to prevent a crime does not, by itself, make a person an aider and abettor.

Defendant contends the court's incomplete instructions on aiding and abetting violated his due process rights because "the question of whether there was a union of act and intent was crucial." He argues a complete instruction regarding aiding and abetting was necessary for the jury's understanding of the case because Jones testified defendant went into OSH alone and tried to use Jones's bank card to purchase the generator. He asserts the OSH videotape footage corroborates as much. The People's theory involved defendant entering the store and moving the generator to an area near the exit thus allowing Jones to enter and steal it. The defense theory involved defendant making a good faith attempt to purchase the generator that Jones later stole. Had the jury accepted Jones's version of events and been properly instructed, defendant maintains it would have found he did not aid or abet Jones's crime because she formulated her intent to steal while in the store.

The People maintain the trial court correctly instructed the jury regarding the intent required to aid and abet a crime. Specifically, the People assert the trial court adequately instructed the jury by giving CALCRIM Nos. 400 and 1702, and defining an accomplice pursuant to section 31.

The law requires an aiding and abetting instruction to include language informing the jury a person aids and abets when the person, "by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) CALCRIM No. 400 does not include reference to an act. CALCRIM No. 1702 addresses knowledge and intent, rather than the requirement of an act.

Moreover, the bench notes for CALCRIM No. 1702 expressly state, "This instruction **must** be given with CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*." We do note the prosecutor argued to the jury that defendant was "guilty as an aider and abettor, if you want to use that theory, because he helped Ms. Jones steal that generator." Having previously referenced intent, the foregoing assertion was a reference to an act by defendant, that specific act having been previously referenced during a discussion of conspiracy, to wit: "one of them went in and pushed the generator near the door and the other one went in and took it."

Nevertheless, assuming the trial court erred in failing to give CALCRIM No. 401, reversal is not required.

The failure to instruct with CALCRIM No. 401 has been characterized—in the context of its substantively identical predecessor, CALJIC No. 3.01—as a failure to instruct on the criminal intent element, and therefore a federal constitutional error. (*People v. Prettyman* (1996) 14 Cal.4th 248, 271; *People v. Beeman, supra*, 35 Cal.3d at pp. 550–551, 560; *People v. Patterson* (1989) 209 Cal.App.3d 610, 616–617.) This error thus invokes the review standard for constitutional errors of harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, any error was harmless beyond a reasonable doubt.

The videotape footage of the crime provided the jury with circumstantial evidence of a planned and coordinated theft by defendant and Jones. It showed defendant approach a cashier with the generator in a cart. He appeared to use a bank card without success before pushing the cart to an area just beyond the cash registers, very near the store's exit. Defendant then exited the store. Less than five minutes later, Jones entered the store. She placed her purse in an empty shopping cart just inside the store's entrance and looked to her left—or toward the checkout area—twice before passing into the main portion of the store. Just over 10 minutes later, Jones approached the same cashier and check stand defendant had used. She purchased a bag of potting soil. While waiting for her change, Jones looked around, watchful of activity in the front of the store. Leaving

the check stand, Jones pushed her cart, stopping just behind the cart with the generator left earlier by defendant. She looked around again and then moved her cart at an angle to the cart with the generator. Jones first transferred her purse and then her purchase, putting the bag of soil on top of the generator, before exiting the store with both items.

Additionally, the jury heard considerable evidence affecting Jones's credibility in significantly negative ways. Officer Theodore testified Jones initially denied even knowing the generator was in her vehicle's trunk. She then gave several stories about how the generator might have come to be in her trunk, indicating defendant and her sister used her car and might have played a part in its presence there. Jones also indicated defendant purchased the generator for her brother-in-law. Theodore testified that after being confronted with the videotape evidence, Jones claimed she had stolen the generator for her brother and it was just a coincidence defendant had left the generator in the cart near the OSH exit.

Jones testified for the defense.[4] She admitted telling Theodore different stories before finally telling the officer, "'Yeah, I'm the one who took it. I walked out the store with it.'" The jury also learned through Jones's testimony that she pled guilty to felony second degree commercial burglary. On cross-examination, Jones admitted she lived in an apartment with neither a front or back yard, nor a garage. She did, however, contend the apartment complex had a "community yard," implying the potting soil she purchased was meant for that space because during direct examination Jones testified she bought the potting soil for her own "yard, to plant some plants." Jones also testified, directly contrary to Theodore's testimony, that she had admitted stealing the generator prior to being confronted with the videotape evidence. Further, when Jones was asked why she pled guilty to felony burglary—a crime requiring an entry with an intent to commit a felony—Jones claimed not to have understood "all the detailed fine lines of the charge." Even more damaging to Jones's credibility, however, was the statement she personally

[4]Jones was the only witness to testify in the defense case.

prepared and signed on November 1, 2012, about six weeks before her testimony at trial. In that statement, Jones claimed the theft was all a "mis[]understanding with [her] friend." She thought he had already used her credit or debit card to purchase the generator before becoming ill and asking her to "go get it." It does not indicate her debit or credit card was declined. Her written statement claims a misunderstanding concerning who had paid for the merchandise, whereas her trial testimony concerns her own alleged last-minute, inside-the-store decision to steal the generator that was conveniently, yet coincidentally, left near the exit. The jury would be very unlikely to accept Jones's version of events in light of her inconsistent statements and testimony.

In sum, this record clearly establishes Jones is far from credible. And the videotape evidence supports the People's theory of the case. As a result, any instructional error by the trial court was harmless beyond a reasonable doubt.

II. Testimony Concerning the Method of Theft

Defendant argues the trial court improperly admitted Officer Theodore's opinion regarding the push-out method of theft because it was not a proper subject for expert opinion. He contends the evidence was profile evidence and reversal is required. The People maintain the officer's testimony was not profile evidence, that he was qualified to offer testimony regarding the push-out method of theft, and that any error was harmless.

Relevant Legal Principles

Evidence Code section 801 provides as follows:

> "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> "(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> "(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) We conclude for the reasons discussed below that the trial court did not abuse its discretion by admitting this testimony.

First, although expert testimony is generally inadmissible on topics "so common" that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert, an expert may testify on a subject about which jurors are not completely ignorant. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1222, citing *People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) In determining the admissibility of expert testimony, "the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (*People v. Prince*, *supra*, at p. 1222; see Evid. Code, § 801, subd. (a).)

"A profile ordinarily constitutes a set of circumstances—some innocuous—characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1226.) In other words, the expert "'attempts to link the general characteristics of [a particular type of criminal] to specific characteristics *of the defendant*.'" (*Ibid*.)

"'Profile evidence,' however, is not a separate ground for excluding evidence; such evidence is inadmissible only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 334, 357.) "'[P]rofile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt.' [Citation.]" (*People v. Prince*, *supra*, 40 Cal.4th at p. 1226.) Generally, profile evidence is "inadmissible to prove guilt." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.)

Improper use of profile evidence must be distinguished from admissible expert testimony regarding established ways in which crimes are committed. (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1223–1226.) In this regard, our Supreme Court has stated that "an expert may testify concerning criminal modus operandi and may offer the opinion that evidence seized by the authorities is of a sort typically used in committing the type of crime charged." (*Id*. at p. 1223.)

Pretrial Proceedings and Theodore's Testimony

Prior to jury selection, defense counsel advised the trial court he objected to evidence expected to be offered by the People. Specifically, Theodore's anticipated testimony and opinion that defendant and Jones employed a particular method of theft called the push-out. He argued the officer was not an expert on whether the theory applied, and because there was video evidence of the event, the jury could decide for themselves. He contended that allowing such testimony would equate to a "legal and factual conclusion, which … should be excluded."

The People responded the officer would testify, based upon his experience, that the push-out method was a common technique employed by thieves and was less likely to come to the attention of loss prevention employees. The court indicated it was inclined to allow such testimony if the People could lay the proper foundation.

During trial, the following testimony was offered:

> "[PROSECUTOR] Q. Now earlier, you said you were trained there was more than one method of theft.
>
> "[OFFICER THEODORE] A. Yes.
>
> "Q. Okay. How many—you said you have done a bunch of theft investigations.
>
> "A. Yes.
>
> "Q. And have you talked to loss prevention officers about theft from stores around the Sonora area?
>
> "A. Yes.

"Q. And when you were in Sacramento working with the sheriffs there, did you talk to other deputy sheriffs there about types of theft?

"A. Yes.

"Q. And when you were working as a deputy sheriff in Sacramento, did you talk to loss prevention officers in that area about types of theft?

"A. Yes, I did.

"Q. Are you familiar with the—

"[DEFENSE COUNSEL]: We would object at this point, Your Honor. I believe we had this discussion prior.

"THE COURT: Yeah. I'm going to—depending on the next question, I'm going to overrule the objection at this time.

"[PROSECUTOR]: The next question was, 'Are you familiar with the term push out?'

"THE COURT: Overruled.

"THE WITNESS: Yes, I am.

"[PROSECUTOR]: Q. What is a push out theft?

"A. A push out is a term that loss prevention and law enforcement uses to describe a certain kind of theft.

"Q. Okay. How many push out thefts have you personally investigated?

"A. I would say no less than 20.

"Q. Okay. Have you talked to loss prevention officers about this type of theft—push out theft?

"A. Yes, I have.

"Q. Have you talked to other peace officers, whether here or in Sacramento, about this type of theft?

"A. Yes, I have.

"Q. And when a push out theft involves more than one suspect, how does that work?

"A. Typically, as far as push out is concerned, the—typically one—more than one person will enter a store, whether at the same time or at different times. One of the subjects will typically select multiple items off the shelf—or in this case, one singular item, will place that in a cart, and will move that cart to an exit area and basically leave it there.

"The second person, um, will monitor the area, will monitor the item, and will monitor for employees—loss prevention staff, et cetera—until the coast is clear, and then the second subject will typically complete the theft by pushing the cart out of the store containing the items.

"Q. And what is the perceived benefit? [¶] Let me ask you this. Have you talked to people who have been arrested or convicted of this type of theft?

"A. Arrested, yes.

"Q. Okay. And what is the perceived benefit of using more than one person for this type of push out theft?

"[DEFENSE COUNSEL]: I would object to this answer, Your Honor. It is not specific, and lacks foundation.

"THE COURT: Um, I'm not so sure it lacks foundation. [¶] Why don't you rephrase it, Counsel?

"[PROSECUTOR]: Q. In your experience—and by that I mean your investigations, the officers you have talked to, the loss prevention officers you have talked to, what is the benefit of using more than one person in a push out theft?

"A. There is several benefits in the fact that there is multiple people to conduct surveillance inside the store and work as a team to complete the theft rather than one singular person.

"There is also a benefit that if loss prevention is, in fact, suspicious of a subject while they're inside of a store and they are watching them—which loss prevention will do via the camera system as the person moves throughout the store—that person selects all the items and leaves the cart. When that person moves away from the cart, typically loss prevention will still follow that one person around the store, either on foot or by camera, to see if they complete the theft or set up another shopping cart or what have you.

"While loss prevention is distracted with that one singular person, the secondary involved party will complete the theft while loss prevention employees are focused on who they believe is going to commit the theft.

"Q. The first person?

"A. Correct."

Our Analysis

In this case, the jurors would have had some common knowledge of theft and how it is accomplished. Nevertheless, expert testimony on this particular method of theft, and its benefits in terms of avoiding detection, would clearly assist the jury. (*People v. Prince, supra,* 40 Cal.4th at p. 1222.)

The expert testimony at issue here is not profile evidence because the expert did not seek to tie the general characteristics of push-out thieves to defendant's specific characteristics. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1226.) Instead, the expert testimony is more like modus operandi evidence, in which the expert testifies about the usual methods or procedures employed to commit particular crimes. (*Id*. at pp. 1223-1224.)

The California Supreme Court has recognized modus operandi evidence """helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior."""" (*People v. Prince, supra,* 40 Cal.4th at p. 1224.) Such evidence "may be helpful to the jury even if the modus operandi is not particularly complex." (*Ibid*.)

An instructive example of admissible modus operandi evidence is found in *People v. Clay* (1964) 227 Cal.App.2d 87.

In *Clay*, the two defendants were charged with burglary and grand theft. (*People v. Clay*, *supra*, 227 Cal.App.2d at p. 89.) At trial, the percipient witnesses testified they saw the defendants enter a store and move in separate directions. (*Id*. at p. 90.) When one of the defendants brought an item to the cash register, the other stood near the register. As the cashier rang up the purchase, the defendant who was making the

purchase asked the cashier to get other items, causing the cashier to look away from the register. As the cashier reached for the items, the other defendant made some movements near the register. The defendants then left the store, apparently through different exits. The storeowner later discovered that money was missing from the register. (*Ibid*.) In addition to the percipient witnesses, a police officer testified as an expert on "'till tapping.'" (*People v. Clay*, *supra*, at p. 92.) The officer opined that in view of the "'usual procedure of till tappers,'" the evidence comported with an instance of till tapping in which one participant distracted the cashier while the other took money from the register. (*Id*. at p. 99.)

After the defendants were convicted, the defendant who had diverted the cashier's attention contended on appeal that the expert's testimony was improperly admitted. (*People v. Clay*, *supra*, 227 Cal.App.2d at p. 92.) In rejecting this contention, the appellate court held the expert had provided modus operandi testimony that properly assisted the jury to determine the intent of the defendant who had distracted the cashier. (*Id*. at p. 98.) The court stated: "It was the testimony of the inspector … which threw a spotlight on the episode as a whole and thus enabled the jury to see the possibility of a relationship between the acts of the two men. This gave meaning to the evidence and permitted the jury to appreciate that defendant's activities while in themselves seemingly harmless, … might well have been part of a cleverly planned and precisely executed scheme." (*Id*. at p. 95.)

Here, Theodore's expert testimony was admissible to explain the modus operandi of thieves employing the push-out method. Like *People v. Clay*, Theodore's testimony gave meaning to the evidence and permitted the jury to consider whether defendant's act of attempting to purchase the generator, then leaving it near the store's exit, was part of a planned theft also involving Jones.

People v. Martinez (1992) 10 Cal.App.4th 1001 and *People v. Robbie*, *supra*, 92 Cal.App.4th 1075, upon which defendant relies, are factually distinguishable. In *Martinez*, the defendant was arrested while driving a stolen vehicle on a California

highway. (*People v. Martinez, supra*, at p. 1003.) The defendant had a suspended driver's license, and he produced an irregular registration card and a forged certificate of title for the vehicle. He told investigating officers he had been heading to Guatemala, and he did not know the car was stolen when he bought it. (*Ibid*.) He was charged with receiving stolen goods and other offenses. (*Id*. at p. 1002.) At his trial, two experts on auto theft rings testified many stolen vehicles of the same type were driven from California to Guatemala along the highway upon which the defendant had been arrested. (*Id*. at p. 1004.) In addition, they testified regarding the statistical rates at which arrested drivers in prior cases had produced similarly falsified vehicle documents and claimed they did not know they were driving stolen vehicles. (*Id*. at pp. 1004–1006.)

The appellate court concluded the experts had offered only improper and prejudicial "profile" testimony, as it relied exclusively on the defendant's similarities to other persons charged with unrelated crimes. (*People v. Martinez*, *supra*, 10 Cal.App.4th at pp. 1007–1008.) The court stated:

> "Presumably the purpose of the evidence was to show that defendant was lying when he claimed he bought the car on a street corner and did not know it was stolen. The prosecution tried to prove this by showing that other drivers found driving similar vehicles under similar circumstances made the same claim. Here the prosecution implicitly asked the jury to use defendant's disavowal of knowledge to bolster the theory that the other drivers were lying when they denied knowledge and then using that conclusion in turn to reach the conclusion that defendant knew the vehicle was stolen. This sort of bootstrap reasoning is impermissible." (*Ibid*.)

Here, unlike *Martinez*, Theodore did not simply testify defendant's actions resembled those of other thieves. As explained above, our Supreme Court has affirmed that "an expert may testify concerning criminal modus operandi and may offer the opinion that evidence seized by the authorities is of a sort typically used in committing the type of crime charged." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1223.) That is the nature of the testimony Theodore offered: Based on his experience, he described a method employed by which thieves successfully avoid detection by loss prevention officers in a retail store. By placing items to be stolen in a cart, then having one subject push the cart

to an area near the store's exit and walk away, the other subject can push the cart out of the store undetected by loss prevention officers because any suspicion remains with the original subject.

In *Robbie*, the defendant was charged with kidnapping for sexual purposes and other sex offenses. (*People v. Robbie, supra*, 92 Cal.App.4th at pp. 1077–1078.) At trial, the defendant maintained his sexual encounter with the victim was consensual. (*Id*. at pp. 1079–1080.) In an effort to overcome this defense, the prosecution offered testimony from an expert on sexual offenders, who opined that "the most prevalent type of behavior" among sex offenders was to (1) initially apply a "minimal amount of force" to the victim, (2) relent after the victim complained, (3) negotiate some form of sexual activity, and then (4) treat the victim respectfully. (*Id*. at pp. 1082–1083.) The expert further opined that due to a "'cognitive distortion,'" sex offenders viewed this conduct as evoking consensual sexual encounters. (*Ibid*.) However, the expert acknowledged the pattern of behavior she described "was equally consistent with consensual activity." (*Id*. at p. 1083.) The appellate court concluded the expert's opinions constituted improper "profile" testimony. (*Id*. at pp. 1083–1087.) Here, Theodore did not refer to defendant; he referenced "subjects" in explaining the push-out method of theft. He did not compare the behavior of the defendant to the pattern or profile and conclude the defendant fit the profile. (*People v. Robbie*, *supra*, at p. 1084.) Instead, Theodore described the manner in which a push-out theft occurs and explained why it is a beneficial method for purposes of avoiding detection. Unlike *Robbie*, Theodore's testimony was properly admitted because defendant's conduct fitting the profile is not "as consistent with innocence as guilt." (*People v. Smith*, *supra*, 35 Cal.4th at p. 358.)

Finally, to the degree defendant argues Theodore's comment that "[o]ne of the subjects will typically select multiple items off the shelf—or in this case, one singular item" amounts to profile evidence, we are not persuaded. Theodore's comment refers to an item and a "subject" rather than to defendant specifically. That brief comment does not amount to improper profile testimony as contemplated by the *Martinez* court.

Even assuming the expert testimony is profile evidence, we still discern no error in its admission. Rather, it is inadmissible only if it is irrelevant, lacks a foundation, or is more prejudicial than probative. (*People v. Smith*, *supra*, 35 Cal.4th at pp. 357-358.) Here, Theodore's testimony was relevant because it bore directly on whether defendant aided and abetted the theft. In addition, Theodore's experience as a police officer and deputy sheriff—and his investigations into at least 20 matters involving the push-out method of theft—qualified him to render an opinion. Thus it was not without foundation. Nor was the evidence more prejudicial than probative.

In conclusion, Theodore's testimony did not amount to improper profile evidence. Nor was his testimony improperly admitted. Consequently, the trial court did not abuse its discretion.

III. Counsel Was Not Ineffective

Defendant contends reversal is required because defense counsel provided ineffective assistance of counsel. More specifically, he argues that by eliciting a hearsay statement during his examination of Jones, resulting in impeachment evidence presented in the form of defendant's prior convictions, defense counsel committed error in the absence of tactical purpose. He asserts the error was "disastrous." On the other hand, the People maintain the alleged deficiency was not prejudicial because it is not reasonably probable a more favorable result would have been rendered absent the alleged error.

To prevail on an ineffective assistance of counsel claim, the appellant must establish two things: (1) the performance of his or her counsel fell below an objective standard of reasonableness, and (2) prejudice occurred as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105; *People v. Bradley* (2012) 208 Cal.App.4th 64, 86–87.) The *Strickland* court explained prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra,* at p. 694.) Further, the high court stated "[a] reasonable probability

is a probability sufficient to undermine confidence in the outcome" of the proceeding. (*Ibid.*)

In this case, we consider *Strickland*'s second prong, assuming for the sake of argument that counsel's performance fell below an objective standard of reasonableness.[5] We answer the question posed by that prong—whether there was a reasonable probability of a different outcome had the error not occurred—in the negative.

Initially, we note defendant's argument overlooks the fact the court instructed the jury that the prior conviction evidence was to be used for a limited purpose:

> "[THE COURT:] … I'm going to advise you that the defendant in this case on February 25, 2008 was convicted of felony theft in Stanislaus County. On that same day, February 25, 2008, he was convicted of another felony theft in Stanislaus County. And on October 18th, 2010, the defendant was convicted of a felony, second degree burglary. Those convictions can be used by you for the purposes of determining if you choose whether or not that statement that he made to Trina Jones is, in fact, truthful or not. You can use this to weigh in your mind if he's truthful. You can't use those felony convictions to try to prove what he's actually convicted of.
>
> "So the purpose of this, if you use it, if you want to impeach the truthfulness of the statement that was gotten in through Trina Jones, but you cannot use it as evidence that he committed this particular offense. Otherwise, someone could be charged with a crime and evidence could be put in that he had a felony conviction and somebody could ask you, well, he had a felony conviction, so you should just convict him of that charge. That's not what this is for. It's just for you to determine whether or not you believe that statement and whether or not you think it's credible.
>
> "So for that purpose, I'm giving this instruction: During the trial, certain evidence was admitted for a limited purpose. You may consider

---

[5]Defense counsel asked Jones the following question: "And what happened when [defendant] came out of the store?" Jones responded: "He gave me my card and said that it didn't work, and I said, 'Well, I'll go in there and get it.'" Later, the People successfully argued Jones's response opened the door to allow impeachment evidence in the form of defendant's prior convictions. After defendant's motion for mistrial was denied, a stipulation was read to the jury concerning defendant's prior felony theft convictions in 2008 and burglary conviction in 2010.

> that evidence only for that purpose and for no other. And that's specifically these three prior felony convictions."

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see *People v. Little* (2012) 206 Cal.App.4th 1364, 1381.) Hence, we presume the jury did not use the evidence as propensity evidence.

Additionally, the evidence of defendant's guilt was strong. Videotape footage of the crime provided the jury with circumstantial evidence of a joint effort by defendant and Jones to steal a generator from the OSH store. After failing to pay for the generator, defendant pushed a cart containing the generator to an area near the store's exit. He then left the store. A few moments elapsed before Jones entered the OSH store, stopping to place her purse in an empty shopping cart as she looked around the store. Shortly thereafter, Jones was seen purchasing a bag of potting soil. She was still watchful of her surroundings. After receiving her change, Jones pushed her cart next to the cart defendant had left in the area just a few minutes earlier. Ultimately, she transfers her purse and the potting soil to the other cart, and then exits the store with the stolen generator. Despite Jones's claim that she did not conspire with defendant to steal the generator but instead decided to do so while in the OSH store buying potting soil, her testimony at trial was inconsistent and contrary to that offered by Officer Theodore. For example, Jones claimed she admitted responsibility before being confronted with the videotape evidence. Jones admitted a felony conviction for burglary but claimed she was confused about what her plea meant. She admitted lying to law enforcement. And she was impeached with a written statement she provided to the probation department following her plea to burglary, because that written statement was in conflict with her trial testimony. Jones had little, if any, credibility.

We find any error was not sufficient to undermine our confidence in the outcome here. It was not reasonably probable a more favorable outcome would have been reached in the absence of the error, assuming said error. Reversal is not required.

IV. The Sentence Imposed on Count II Must Be Stayed

Defendant argues the trial court imposed an unauthorized sentence as to count II when it imposed three years and ordered it to run concurrent to the sentence imposed on count I. This is so, defendant asserts, because the burglary and theft were committed with the same intent and objective. The People concede error. We accept the People's concession.

Section 654, subdivision (a) provides as follows:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution of the same act or omission under any other."

The statute "precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) If a defendant is convicted under two statutes for one act or indivisible course of conduct, section 654 requires the sentence for one conviction be imposed, and the other imposed and then stayed. (*Deloza*, at pp. 591–592.) "Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]" (*Id*. at p. 592.) The correct procedure is to impose a sentence for each count and enhancement and then to stay execution of sentence as necessary to comply with section 654. (*People v. Duff* (2010) 50 Cal.4th 787, 795–796.) The statute serves the purpose of preventing punishment that is not commensurate with a defendant's criminal liability. (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1088, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 343-344.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa*,

supra, 54 Cal.4th at pp. 343-344; see *People v. Hairston* (2009) 174 Cal.App.4th 231, 240.)

Here, while pronouncing sentence, the trial court stated:

> "Count 2 will be declared aggravated. For violation of 484/666 …, petty theft with a prior, felony; probation be denied, defendant committed to the custody of the sheriff, to be housed in the Tuolumne County Jail for the upper term of the base sentence [three years]. That will be run concurrent."

Defendant was convicted of burglary in count I and theft in count II. However, section 654 precludes "punishment for both burglary and theft where, as in this case, the burglary is based on an entry with intent to commit that theft." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) Like *Alford*, here defendant's entry into OSH was based upon an intent to commit a theft therein. Thus, we will direct the trial court to amend the abstract of judgment to reflect the sentence in count II was imposed and stayed.

DISPOSITION

The sentence imposed on count II is ordered stayed. The clerk of the court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
POOCHIGIAN, J.